FILE COPY

No. 157

Supreme Court of the United States.

OCTOBER TERM, 1947.

COMMONWEALTH OF MASSACHUSETTS ET AL.

v.

UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF MASSACHUSETTS ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioners, pray that a writ of certiorari may issue to review the judgments of the Circuit Court of Appeals for the First Circuit entered April 2, 1947, in the cross-appeals between the above-named parties, docketed therein as numbered 4193 and 4209.

Opinions Below.

A memorandum opinion was filed in the District Court by Wyzanski, J., and appears at pages 13 to 17 of the record.

The opinion of the Circuit Court of Appeals appears at pages 29 to 33 of the record.

Jurisdiction.

The jurisdiction of this Court rests on Section 240 of the Judicial Code, as amended.

Question Presented.

This is a suit by the United States of America to recover from the defendant Spencer for capital stock and social security taxes owed by the defendant's assignor and raises one important question: Can the United States of America recover under United States Revised Statutes, Section 3466, from an assignee of an insolvent taxpayer for taxes due it under Title IX of the Federal Social Security Act when the assignee has made payment of said tax to a state under a federally certified state unemployment compensation act and in accordance with the provisions of Section 902 of the Federal Social Security Act as amended?

Statement.

There is no dispute as to the facts, which are briefly as follows: The Somerville Sales & Service, Inc., being insolvent, in 1939 made a common-law assignment for the benefit of creditors. The Commissioner of Internal Revenue filed with the assignee a claim against the assignor for 1938 federal unemployment compensation taxes under

Title IX of the Social Security Act in the sum of $963.08, for 1938 and 1939 federal insurance contributions taxes under Title VIII of said Act in the sum of $690.05, and for 1939 capital stock in the sum of $21.00. The Commonwealth of Massachusetts filed with the assignee its claim for state unemployment taxes under Massachusetts Unemployment Compensation Act in the sum of $803.72, representing contributions for 1938 and 1939. On October 6, 1939, the assignee paid out of the sum of $1135.11 which he had realized from the sale of the assets of the assignor $803.72 in full payment of the claim of the Commonwealth of Massachusetts and the remainder of $331.39 he paid to the Collector of Internal Revenue. This latter sum was credited to Title VIII taxes due for 1938 and there remained unpaid the sum of $1342.74 with interest. Massachusetts has agreed to pay over the above-mentioned $803.72 to the United States if the payment to it was in disregard of the priority of the United States under Revised Statutes, Section 3466, and the United States has agreed that if it prevails the judgment shall be limited to $803.72.

The lower Court held that the United States had priority as to its capital stock taxes, its Title VIII taxes, and 10 per cent of its Title IX taxes, but that it could not recover 90 per cent of its Title IX taxes, stating that the taxpayer or his assignee had the alternative right to pay the 90 per cent of his obligation under Title IX to an approved state unemployment fund.

From the finding of the lower Court both parties appealed. The Circuit Court of Appeals affirmed the judgment of the lower Court as to Title VIII taxes and capital stock taxes and reversed same as to Title IX taxes. The effect of the decision of the Circuit Court of Appeals was to give full priority to the United States of America for all of these taxes.

From the decision of the Circuit Court of Appeals with reference to both appeals the petitioner now seeks relief in this Court.

Specification of Errors.

The Circuit Court of Appeals erred in holding that the defendant Spencer as assignee of the taxpayer did not have the right to exercise the option given to a taxpayer under Section 902 of the Social Security Act to pay the Commonwealth of Massachusetts towards the liability of the taxpayer under an approved state unemployment act, and receiving credit therefrom towards the taxpayer's liability to pay any federal tax to the United States of America.

Reasons for Granting the Writ.

The principal reasons for the granting of this writ are that the exact question raised in this case has never been passed upon by the Supreme Court of the United States and that a decision is desirable as a precedent and authority for all states having approved unemployment acts.

Respectfully submitted,

CLARENCE A. BARNES,
Attorney General,

NATHAN B. BIDWELL,
Assistant Attorney General.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

It is respectfully submitted that Section 902 of the Social Security Act as amended, permitting credit to a taxpayer for the payment of the liability imposed by Section 901, does not contradict or repeal the provisions of Section 3466 of the United States Revised Statutes.

Section 902 as amended creates a situation in which the taxpayer or his assignee has the option of doing one or two things: He can pay the United States Government directly, pursuant to the provisions of Section 901, or he may elect to pay the state government and exercise his option of receiving the credit provided for by Section 902. The exercise of this option by an assignee of the taxpayer is not in violation of Section 3466 of the United States Revised Statutes, since the payment is made to the state with the consent of the federal government and at its express invitation. Even if it be assumed that the provisions of Section 902 as amended are in conflict with Section 3466 of the United States Revised Statutes, it is submitted that, since Section 902 of the Social Security Act is the later enactment of Congress, it would amend, modify or even repeal such provisions of Section 3466 as were inconsistent or in conflict with Section 902.

The United States Supreme Court has considered the question of priority of taxes due the federal government under Title VIII as against taxes due to a state under an approved unemployment compensation act. This question was considered in *People of State of Illinois, ex rel. Gordon,* v. *United States,* 66 S. Ct. 841, where it was held that Section 3466 gave a priority to the federal government for taxes due under Title VIII as against the claim of a state for taxes under its unemployment compensation act.

The case at bar, however, is distinguishable from the Gordon case in that the taxpayer (through his assignee) is the person who is seeking the credit provided for by Section 902 as amended. It is respectfully submitted that the Gordon case is not decisive or controlling in the case at bar, since the case at bar does not raise a question of priority between the United States and the Commonwealth of Massachusetts, but is one which maintains the right of the taxpayer to pay directly to the state by virtue of authority granted to him by federal law.

The language of Section 902 as amended specifically states that the "taxpayer shall be allowed credit for the amount of contributions" paid into an unemployment fund under a state law. There is no reference or language of any kind indicating that this credit can be taken by a state. Recognition of the credit provision on behalf of the taxpayer as against the taxes due the federal government is consistent with the indicated purposes of the Social Security Act.

Steward Machine Company v. *Davis*, 301 U.S. 548.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals for the First Circuit.

CLARENCE A. BARNES,
Attorney General,

NATHAN B. BIDWELL,
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